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CASE NO.

in the

Supreme Court

of the

United States

OCTOBER TERM 1984

EASTERN AIRLINES INC.
A Delaware corporation,

Appellant,

vs.

STATE OF FLORIDA
DEPARTMENT OF REVENUE,

Appellee,

On Appeal From the Supreme Court of Florida

JURISDICTIONAL STATEMENT

KIMBRELL, HAMANN, JENNINGS, WOMACK, CARLSON & KNISKERN, P.A.

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QUESTIONS PRESENTED

1. Whether certain provisions of Chapter 83-3, Laws of Florida, violate the equal protection and due process clauses of the Fourteenth Amendment of the United States Constitution by creating an arbitrary tax classification which invidiously discriminates against certain similarily situated common carriers.

2. Whether by providing tax credits to local farmers and fisherman, Chapter 83-3, Laws of Florida, unconstitutionally discriminates against interstate commerce in violation of the commerce clause of Article I, Section Eight, of the United States Constitution.

    a. Whether the Supreme Court of Florida erred in deciding that Appellant lacked standing to raise the constitutionality of the discriminatory refund provisions of the law.

CASE NO.

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EASTERN AIRLINES INC.
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Department of Revenue,

Appellee,

On Appeal From the Supreme Court of Florida

JURISDICTIONAL STATEMENT

LIST OF PARTIES

All of the parties appearing in the Supreme Court of Florida are listed in the caption. Appellant has no subsidiaries or affiliates, other than those wholly owned. It owns interest in other corporations listed in the Appendix. (App. E *infra*).

OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at 455 So.2d 311 (App. A, *infra*). The final Judgment of the Trial Court is not reported (App. B, *infra*).

JURISDICTION

Appellant appeals from the final order and judgment of the Supreme Court of Florida entered September 12, 1984, denying Appellant's petition for rehearing, and its decision entered June 14, 1984, holding valid a state tax statute. In its Complaint in the trial Court, and throughout the proceedings in the state courts, Appellant drew into question the validity of that Law on the grounds of its repugnance to the Constitution of the United States. Notice of Appeal was filed with the Clerk of the Supreme Court of Florida on November 28, 1984. This Court has jurisdiction of this appeal by virtue of 28 U.S.C. §1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Commerce Clause of Article I, Section 8 of the United States Constitution, the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution, and the pertinent portions of the challenged State Statute, Chapter 83-3, Laws of Florida, are reprinted in the Appendix (App. F, *infra*).

STATEMENT

The Florida legislature enacted Chapter 83-3 effective April 1, 1983 which revised the tax structure of Chapters 212 and 220 of the Florida Statutes. Eastern Air Lines, Inc., filed suit in the Circuit Court of Leon County,

Florida, whereby it sought declaratory and injunctive relief from the enforcement of the tax act, alleging that the law violated the Commerce Clause of Section Eight of the United States Constitution and the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution. The Circuit Court of Leon County, after consolidating the case for purposes of trial with the similar case of *Delta Air Lines, Inc. v. State of Florida, Department of Revenue*, entered a Final Judgment dismissing Appellant's Complaint. (App. B, *infra*). On Appeal to the District Court of Appeal the case was certified to the Supreme Court of Florida.

The constitutional issues presented by Appellant to the Supreme Court of Florida, by briefs and oral argument, were the same as those raised in the initial pleading before the trial court. The Supreme Court of Florida specifically decided against Appellant on all issues now presented to this Court on Appeal. (App. A, *infra*).

The Supreme Court of Florida considered the issue raised by Appellant that the tax law unconstitutionally discriminates against interstate commerce but rejected it on the ground that Appellant lacked standing to challenge the provisions of the law.

The Supreme Court of Florida considered and specifically addressed the issues of the equal protection and due process clauses of the Fourteenth Amendment to the Constitution and found that the statute met the tests of *Walters v. City of St. Louis*, 347 U.S. 231, 98 L.Ed. 660, 74 S.Ct. 505 (1954); *Madden v. Kentucky*, 309 U.S. 83, 84 L.Ed. 590, 60 S.Ct. 406 (1940) and *Allied*

Stores of Ohio v. Bowers, 358 U.S. 522, 3 L.Ed.2d 480, 79 S.Ct. 437 (1959).

Appellant is a common carrier certified by the Civil Aeronautics Board to provide, and it is providing, interstate and foreign as well as intrastate transportation for passengers, cargo and mail. The scheme of taxation in Chapter 83-3, Laws of Florida, §212.92, Florida Statutes, provides for a refund to farmers and fishermen of such taxes collected, to the direct detriment of Appellant by discriminating against interstate commerce. The effect of these refund provisions is to cast a greater burden of the tax on Appellant's conduct of interstate commerce as well as the interstate and foreign commerce of all airlines purchasing special fuel in Florida. The Supreme Court of Florida failed to consider *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 50 L.Ed.2d 514, 97 S.Ct. 599 (1977) and *Maryland v. Louisiana*, 451 U.S. 725, 68 L.Ed.2d 576, 101 S.Ct. 2114 (1981). The lower court instead swept away all arguments on these important constitutional questions on the ground that Appellant lacked standing.

Although Appellant's initial pleadings clearly raised the constitutional questions, and alleged irreparable damage if enforcement of the statutory tax scheme was not enjoined, the question of standing was raised by Appellee for the first time in the Supreme Court of Florida. It was not raised by the initial pleadings nor was it the basis of the trial court's Final Judgment. In the context of whether Appellant has standing to raise the issue that the statutory tax provisions are repugnant to the commerce clause of the Constitution, the test to be applied is whether the interest sought to be protected by the Complaint is arguably within the

zone of interests to be protected or regulated by the statute or constitutional guarantee in question. *Data Processing Service v. Camp*, 397 U.S. 150, 25 L.Ed.2d 184, 90 S.Ct. 827 (1970). Speaking to a taxpayer's suit this Court stated in *Flast v. Cohen*, 392 U.S. 83, 20 L.Ed.2d 947, 88 S.Ct. 1942 (1968): "In terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in form historically viewed as capable of judicial resolution."

In addition, Chapter 83-3, Laws of Florida, Section 212.08(4), and Section 212.70, Florida Statutes, combine to invidiously discriminate against Appellant by granting an exemption on fuels used by vehicles, other than aircraft, which are licensed as common carriers by the Interstate Commerce Commission and by adopting an artificial initial price for such fuels. At the time this case was first appeared in the Supreme Court of Florida, Appellant was paying eighty three cents a gallon for its fuel. The effect of the artificial initial price of fuel is not a five percent tax on the price per gallon of fuel purchased by Appellant in the State of Florida but a tax of nearly seven percent. It is recognized that a state may make distinctions in classes so long as it proceeds on a rationale basis and does not resort to palpably arbitrary classifications.

The test is whether the classification rests on some ground of difference having a fair and substantial relation to the object of the legislation so that those in similar situations will be treated equally. *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 3 L.E.2d 480, 79 S.Ct. 437 (1959). Here the classification, except for aircraft,

is common carriers. This is the same unequal and arbitrary classification which this Court found to be unjustifiably unequal, whimsical and arbitrary in *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550, 79 L.Ed. 1054, 55 S.Ct. 525 (1934).

CONCLUSION

The questions presented are substantial and are of public importance. Appellant submits that probable jurisdiction should be noted, and the case should be set for argument together with the case of *Delta Air Lines, Inc v. State of Florida, Department of Revenue.*

Respectfully submitted,

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By: _____
CHARLES A. KIMBRELL
Attorneys for Appellant

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the Appellant's Jurisdictional Statement was mailed to LARRY LEVY, ESQ. General Counsel, Department of Revenue, Room 102, The Carlton Building, Tallahassee, FL 32301, and JOSEPH C. MELLICHAMP, ESQ., Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, FL 32301, this 11th day of December 1984.

KIMBRELL, HAMANN,
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APPENDIX A

OPINION OF SUPREME COURT OF FLORIDA
SUPREME COURT OF FLORIDA

NO. 63,949

EASTERN AIR LINES, INC.,
Appellant,

v.

DEPARTMENT OF REVENUE,
Appellee.

[June 14, 1984]

ADKINS, J.

The case is before us on an order from the First District Court of Appeal certifying the issues in the case to be of great public importance. We have jurisdiction. Art. V, §3(b)(5), Fla. Const.

This case arose with the filing of a complaint by Eastern Air Lines in the circuit court of Leon county seeking declaratory and injunctive relief from the enforcement of provisions of chapter 83-3, Laws of Florida, on the grounds that the law was unconstitutional. Specifically, Eastern alleged that the law violated the equal protection and due process clauses of the Florida and United States Constitutions, was an unconstitutional delegation of legislative authority, and violated the commerce clause of the United States Constitution. By stipulation, the parties agreed to a procedure whereby

Eastern was allowed to self-accrue the sales tax imposed under chapter 83-3, which became effective on April 1, 1983, during the pendency of the proceedings subject to certain conditions. The trial judge entered his final judgment in this case on May 27, 1983, incorporating the order he had entered in a similar action filed by Delta Airlines and upholding the constitutionality of chapter 83-3. On June 24, 1983, Eastern filed its notice of appeal with the First District Court of Appeal. On July 12, 1983, that court issued its order certifying the case for immediate resolution by this Court.

Chapter 83-3 was enacted during a special session of the Florida legislature which was called for the express purpose of addressing road transportation and public transit needs in the state. The law revises the tax structure of chapters 212 and 220 of the Florida Statutes. The new law eliminates one-half (4 cents) of the excise tax imposed by former chapter 206, Florida Statutes (1981), on fuel purchased for road transportation use and imposes a five percent sales tax on this fuel through the new Part II of former chapter 212, chapter 83-3, section 6. That section bases the five percent sales tax on a predetermined price for fuel of $1.148 per gallon. The new sales tax is imposed on all aviation jet fuel purchased by interstate air common carriers, but is not imposed on railroads and vessels due to the proration provision which applies to railroads and vessels allowing taxation based on cost and only on the carrier's intrastate mileage. Ch. 83-3, §5 (amends §212.08(4). Fla. Stat. (Supp. 1982)). Section 4 of the law provides:

> (4) EXEMPTIONS, ITEMS BEARING OTHER EXCISE TAXES, ETC.—Also exempt are water (not exempting mineral water or

carbonated water), and; all fuels used by a public or private utility, including any municipal corporation or rural electric cooperative association, in the generation of electric power or energy for sale. Fuel other than motor fuel and special fuel is taxable as provided in this part, except that fuel expressly exempt herein. Motor fuels and special fuels are taxable as provided in part II, except that those used by vehicles, other than aircraft, which are licensed as common carriers by the Interstate Commerce Commission to transport persons or property in interstate or foreign commerce and vessels used to transport persons or property in interstate or foreign commerce are taxable only to the extent provided herein.

The first issue which we will address is Eastern's contention that the proration provisions, which do not apply to airlines, violate concepts of equal protection by not treating all common carriers alike. Eastern asserts that all interstate carriers, whether they be airlines, railroads, trucks or vessels, are similarly situated for fuel tax purposes. The circuit court found that Eastern did not sustain its burden of demonstrating that the classification is hostile and oppressive and held that there "is no invidious discrimination by the creation of an arbitrary classification." The court's order states: "Classifying airlines differently from vessels and railroads for fuel tax purposes is not arbitrary. Airlines enjoy advantages and must tolerate some disadvantages due to their distinctive nature." The court cited the example of the airlines being exempt from ad valorem taxes on the lease of property from the county or other governmental unit pursuant to chapter 80-368, Laws of

Florida, while vessels and railroads are not. The court also noted that proration of mileage for aircraft has proven difficult in the past because of flight patterns over the Gulf of Mexico and the Atlantic Ocean to avoid the accumulation of intrastate mileage.

When the state legislature, acting within the scope of its authority, undertakes to exert the taxing power, every presumption in favor of the validity of its action is indulged. Only clear and demonstrated unsurpation of power will authorize judicial interference with legislative action. *Walters v. City of St. Louis*, 347 U.S. 231 (1954). In the field of taxation particularly, the legislature possesses great freedom in classification. The burden is on the one attacking the legislative enactment to negate every conceivable basis which might support it. *Madden v. Kentucky*, 309 U.S. 83 (1940); *Just Valuation & Taxation League, Inc. v. Simpson*, 209 So.2d 229, 323 (Fla. 1968). The state must, of course, proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. *Department of Revenue v. AMREP Corp.*, 358 So.2d 1343, 1349 (Fla. 1978). A statute that discriminates in favor of a certain class is not arbitrary if the discrimination is founded upon a reasonable distinction or difference in state policy. *Allied Stores v. Bowers*, 358 U.S. 522 (1959).

We agree with the circuit court's conclusion that Eastern has not met its burden in attacking the classification made here. They have failed to demonstrate that a hostile and oppressive discrimination has been made. There are many obvious distinctions between public road and highway transportation of persons and property and air transportation upon which the classifications at issue could rationally be based. The

modes of transportation are inherently and essentially different. The classification drawn does not violate concepts of equal protection.

Eastern also argues that the statute, by adopting an initially established fuel price of $1.148 per gallon upon which to base the tax rate, violates concepts of equal protection and unconstitutionally restricts the rights of individuals to contract. The provision being challenged reads as follows:

> §212.70 Tax imposed on sale of motor fuel and special fuel; tax upon ultimate consumer; determination by department; notification.—
>
> (3) Prior to June 1 of each year, the department shall determine the appropriate sales tax applicable to the retail price per gallon of motor fuel and special fuel as follows:
>
> (a) The department shall determine the appropriate total motor fuel and special fuel retail price, including any federal, state and local excise taxes on such fuel, for the forthcoming 12-month period beginning June 1, by adjusting the initially established price by the percentage change in the average monthly gasoline price component of the Consumer Price Index, issued by the United States Department of Labor, for the most recent 12-month period ending March 31, compared to said average for the 12-month period ending March 31, 1984. However, the adjustment provided herein shall first be made for the forthcoming 12-month period beginning June 1, 1985.

(b) The tax per gallon shall be computed as 5 percent of said total retail price, rounded to the nearest one-tenth of one cent.

(c) The initially established price is §1.148 per gallon.

Eastern asserts that the price set is not related to the actual price of aviation fuel and, therefore, is arbitrary and unreasonable. We do not agree. The tax is levied on first withdrawal of the fuel from the storage tanks and is imposed on all consumers equally regardless of the nature of transport. We find no merit in Eastern's argument that the predetermined price structure invidiously discriminates against airlines.

Eastern also contends that section 6 of the law constitutes an improper delegation of legislative power by relating the price adjustment for future periods to the percentage change in the average monthly gasoline price component of the Consumer Price Index issued by the United States Department of Labor. The Consumer Price Index referred to in the law is authorized by 29 U.S.C. §§ 2, 2a and 2b (1976). Under these code provisions, the Secretary of Labor has broad powers to collect, collate and report statistics, and, to that end, has the power to use bureaus provided for the department and is authorized to call upon other departments of the federal government for data and the results obtained by them. More importantly, the Secretary of Labor may "collate, arrange, and publish such statistical information so obtained in the same manner as to him may seen wise." 29 U.S.C. §2. The Consumer Price Index is widely used by the federal government to determine such things as cost of living increases in

social security, retirement benefits for the military, and other appropriations such as child care payments.

The circuit court in its final judgment determined that the method of appropriation in chapter 83-3 is equivalent to the method which allowed the Department of Education to appropriate state funds to a state agency based on the Florida Price Level Index and which was found to be constitutional in *Gindl v. Department of Education*, 396 So.2d 1105 (Fla. 1979). Eastern argues that the instant case should be distinguished from *Gindl* because here the Department of Revenue is delegated to determine the price upon which the tax will be based by using a federal agency's index to be adopted in the future and over which no Florida agency has any control. Eastern argues that since the department, in arriving at the tax applicable to the price, must, of necessity, rely on an administrative act of the United States Department of Labor which will first take place on March 1, 1984, the legislature has shifted its constitutional duties to that federal agency contrary to the established rule of this state, citing as authority this Court's decision in *State v. Welch*, 279 So.2d 11 (Fla. 1973).

In *State v. Welch*, this Court considered the constitutionality of a portion of the former Florida Drug Abuse Law, chapter 404, Florida Statutes (Supp. 1972), which purported to prohibit certain acts by reference. Specifically, the law declared that it was the intent of the legislature to include under that chapter "all drugs controlled by the drug abuse laws of the United States, now or in the future," in addition to those specified under Florida law. §404.515, Fla. Stat. (Supp. 1972). In *Welch* this Court looked to the rule of

law announced in *Freimuth v. State*, 272 So.2d 473 (Fla. 1972). There, the Court said that the legislature may adopt provisions of federal statutes and administrative rules made by a federal administrative body that are in existence and in effect at the time the legislature acts, but it would be an unconstitutional delegation of legislative power for the legislature to adopt in advance any federal act or the ruling of any federal administrative body that Congress or an administrative body might see fit to adopt in the future. 272 So.2d at 476. Accordingly, this Court held the statute unconstitutional for attempting to incorporate by reference future legislative and/or administrative actions of jurisdictions outside Florida. *Id.*

We believe that Eastern's reliance on the aforementioned language is misplaced. The statute under attack merely provides that an adjustment be made to the fuel price which is based on the percentage change in the average monthly gasoline price component of the Consumer Price Index. Here, the legislature is merely setting forth the manner in which the department is to determine the appropriate total motor fuel and special fuel retail price. The department is directed with precision how to make such a determination. We think the language of *Welch* and *Freimuth* should be interpreted to apply to statutes which incorporate federal statutes or administrative rules which substantively change the law, and not to a statute which incorporates a federal index to provide aid in making a ministerial determination.

Furthermore, we do not agree with Eastern's contention that the statute is also constitutionally infirm because the Department of Revenue will utilize a

consumer price index which is to be determined *after* the effective date of the act. In *Gindl* we upheld a statutory provision which required a computation based on the most recent publication of the Florida Price Level Index prepared by the Department of Administration. The statute was to take effect July 1, 1976. The Department of Education intended to base the distribution on a survey which would be started in October or November of 1976 and completed during the early part of 1977. In other words, the effect of the statute was to reach forward and allow distribution to be calculated on the most recent publication of the Florida Price Level Index, an index which was not in existence when the law became effective. We agree with the circuit court's determination that the method of appropriation in chapter 83-3 is equivalent to the method approved in *Gindl.*

The final issue which Eastern has raised is whether chapter 83-3 unconstitutionally discriminates against interstate commerce since its tax credit provisions provide a direct commercial advantage to local agriculture and commercial fishing to the detriment of similar interstate activities. The relevant section of the law provides:

> §212.92 Refunds.—
> (e) Refund to farmers and fishermen.—
>
> 1. [A]gricultural purposes means motor fuel or special fuel used in any tractor, vehicle, or other farm equipment which is used exclusively on a farm or for processing farm products on the farm and no part of which is used in any vehicle or equipment driven or

operated upon the public highways of this state. This restriction shall not apply to the movement of farm vehicles or farm equipment between farms.

2. For the purposes of this paragraph, 'commercial fishing purposes' shall be construed to mean motor fuel or special fuel used in the operation of boats, vessels, and equipment used exclusively for the taking of fish, crayfish, oysters, shrimp, and sponges from the salt and fresh waters under the jurisdiction of the state for resale to the public but shall in no way be construed to include fuel used for sports or pleasure fishing, no part of which is used in any vehicle or equipment driven or operated upon the highways of this state.

3. Any person who uses any motor fuel or special fuel for agricultural purposes or commercial fishing purposes on which the tax imposed by this part has been paid shall be entitled to a refund of said tax.

The Department of Revenue questions Eastern's standing to challenge chapter 83-3's full refund provisions, section 212.92(1)(e), 2. & 3., since Eastern is "neither in the *fishing* or *farming business* and . . . Eastern does not contend that farmers and/or fishermen are in direct or indirect competition with their airline enterprise." Eastern does not compete with fishing or agriculture. We agree that Eastern does not have standing to raise the unconstitutionality of these full refund provisions. In *State ex rel. Clarkson v. Philips*, 70 Fla. 340, 70 So. 367 (1915), this Court held that the constitutionality of

a provision of a statute cannot be tested by a party whose rights or duties are not affected by it, unless the provision is of such a nature that it renders invalid a provision of the statute that does affect the party's rights or duties.

It is a fundamental principle that a statute, if constitutional in one part and unconstitutional in another part, may remain valid except for the unconstitutional portion. However, this is dependent upon the unconstitutional provision being severable from the remainder of the statute. The severability of a statutory provision is determined by its relation to the overall legislative intent of the statute of which it is a part, and whether the statute, less the invalid provisions, can still accomplish this intent. *Cramp v. Board of Public Instruction*, 137 So.2d 828 (Fla. 1962).

Additionally, if the valid portion of the law would be rendered incomplete, or if severance would cause results unanticipated by the legislature, there can be no severance of the invalid parts; the entire law must be declared unconstitutional. *Kass v. Lewin*, 104 So.2d 572 (Fla. 1958). This Court succinctly summarized the general rules regarding severability in *Presbyterian Homes of Synod v. Wood*, 297 So.2d 556 (Fla. 1974), wherein the Court stated:

> An unconstitutional portion of a general law may be deleted and the remainder allowed to stand if the unconstitutional provision can be logically separated from the remaining valid provisions, that is, if the legislative purpose expressed in the valid provisions can be accomplished independently of those which are

> void; and the good and bad features are not inseparable and the Legislature would have passed one without the other; and an act complete in itself remains after the invalid provisions are stricken.

Id. at 559.

We believe that the legislature's intent could still be accomplished if the full refund provisions relating to local commercial fishing and agriculture were to be eliminated and the remainder of the statute left intact. Therefore, we cannot say that these provisions, were we to declare them unconstitutional, are of such a nature that they would render invalid the portion of the statute that does affect Eastern's rights. Eastern has no standing to raise this issue.

Accordingly, we affirm the order of the circuit court.

It is so ordered.

ALDERMAN, C.J., BOYD, OVERTON, McDONALD and SHAW, JJ., Cocur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Direct Appeal of Judgment of Trial Court, in and for Leon County, Ben C. Willis, Judge, Case No. 83-855—Certified by the District Court of Appeal, First District, Case No. AT-359

Joseph F. Jennings of Kimbrell, Hamann, Jennings, Womack, Carlson and Kniskern, Miami, Florida,

for Appellant

Jim Smith, Attorney General and Joseph C. Mellichamp, III, Assistant Attorney General, Tallahassee, Florida; and Larry Levy, General Counsel and Jane Mostoller, Assistant General Counsel, Department of Revenue, Tallahassee, Florida,

for Appellee

APPENDIX B

JUDGMENTS AND OPINIONS OF TRIAL COURT

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN
AND FOR LEON COUNTY, FLORIDA

CASE NO. 83-855

EASTERN AIR LINES, INC.,
a Delaware corporation,

Plaintiffs,

vs.

STATE OF FLORIDA, DEPARTMENT
OF REVENUE,

Defendant.

FINAL JUDGMENT

The above cause was consolidated with Case No. 83-761, Delta Air Lines, et al v. State of Florida, Department of Revenue, and, by consent of the parties, was tried and argued before this Court on May 12, 1983. The Court has considered the pleadings, evidence, and argument and briefs of counsel for the parties, and being otherwise advised, it is

ORDERED AND ADJUDGED:

For the reasons stated in the Final Judgment dated May 23, 1983 in abovementioned Delta Air Lines case,

No. 83-761, the Complaint in this cause is dismissed finally. A copy of said final judgment in Case 83-761 is hereto attached and by reference is made a part hereof.

DONE AND ORDERED, at Tallahassee, Leon County, Florida, this 27th day of May, 1983.

/s/ BEN C. WILLIS
Ben C. Willis
Circuit Judge

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN
AND FOR LEON COUNTY, FLORIDA

CASE NO. 83-761

DELTA AIR LINES, INC.,
a Delaware corporation, et al.,

Plaintiffs,

v.

STATE OF FLORIDA, DEPARTMENT
OF REVENUE, et al.,

Defendants.

FINAL JUDGMENT

This cause is before the Court on final hearing on the pleadings, evidence and argument of counsel for the respective parties, and on the briefs of counsel for the parties, intervenors and amicus curias, and the Court having considered all of same and being otherwise advised in the premises, it is

ORDERED AND ADJUDGED:

1. The Plaintiff asserts that Senate Bill No. 8-A, Chapter 83-3, Florida Statutes, titled "an act relating to transportation finance and administration" violates

a) its constitutional right to equal protection under the United States and Florida Constitutions,

b) the Commerce Clause of the United States Constitution,

c) Article III, Sections 10 and 11 of the Florida Constitution.

Intervenor Eastern Airlines also asserts Senate Bill 8-A is an improper delegation of legislative authority. Plaintiff prays for declaratory and injunctive relief to prevent Defendant Department of Revenue (DOR) from assessing and collecting such tax.

2. Senate Bill 8-A was signed into law on March 8, 1983 to become effective April 1, 1983. It revises the tax structure of Chapter 206, 212, and 220, Florida Statutes. Prior to the enactment of said Bill motor fuel was taxed pursuant to Part I, Chapter 206 at the rate of 8 cents per gallon as follows:

a) a "first gas tax" of 4 cents to be used for maintenance and construction of state road,

b) a "second gas tax" of 2 cents to be used by counties to secure bond obligations,

c) a "seventh-cent tax" used by counties for public transportation, and

d) an "eighth-cent tax" used by municipalities for transportation-related expenditures.

Prior to the enactment of Senate Bill 8-A special fuel was taxed pursuant to Part II, Chapter 206 at the rate of 8 cents per gallon with distribution the same as

Part I, Chapter 206. Aviation fuel was exempt from Part II.

Prior to the enactment of Senate Bill 8-A, pursuant to Chapter 212, common carriers paid a sales tax of 5% of the sales price of fuel, such tax accruing and being collected upon first withdrawal from the storage facility. This tax was prorated according to the ratio of the interstate mileage of the carrier to its total mileage for the previous fiscal year.

Prior to the enactment of Senate Bill 8-A, Chapter 220 imposed an income tax on corporations without credit for motor or special fuel taxes paid.

3. Senate Bill 8-A eliminates the "first gas tax" of Part I, Chapter 206 in 206.41 and reduces the special fuel tax in Part II from 8 cents to 4 cents. Distribution is the same as prior to enactment. Thus, under both Part I and Part II of Chapter 205 the tax is reduced from 8 cents to 4 cents per gallon.

Under Chapter 212, the Bill now imposes a 5% sales tax on motor and special fuel based on a predetermined price of $1.148, or 5.7 cents, per gallon until June 1, 1985, at which time the DOR will determine the price according to the most recent Consumer Price Index. Distribution is for "transporation purposes" per Section 206.46 from a Transportation Trust Fund. The Chapter 212 tax upon common carriers will continue to be prorated by intrastate mileage; however airlines will be taxed on all aviation fuel purchased in Florida, regardless of use in interstate or intrastate travel. Chapter 220 now affords a 50% or $5 million (the lesser)

credit to Florida-based corporations with 1,200 or more employees.

4. Plaintiff objects to Senate Bill 8-A on the grounds it violated equal protection by subjecting them to different tax treatment than other common carriers, creates a classification which is discriminated against by higher tax rates, subjects them to a predetermined price not related to the actual price of aviation fuel, and discriminates against foreign corporations by allowing the Chapter 220 tax credit only to corporations with their corporate or home office in Florida.

Plaintiff alleges Senate Bill 8-A violates the United States Constitution Commerce Clause by exceeding the state limitations in taxing interstate commerce because the apportionment is unfair and not based on intrastate use, agricultural and fishing interests are favored by total fuel tax exemption, the tax credit is an attempt to force corporations to establish corporate offices in Florida, there is no nexus between the tax on airlines and the use of funds for roads, and the tax is not fairly related to services provided to interstate airlines.

Plaintiff originally claimed Senate Bill 8-A violated Article III, Sections 10 and 11 of the Florida Constitution because it was a special law. However, in light of the recent Supreme Court decision in *Department of Legal Affairs, State of Florida, et al. v. Sanford-Orlando Kennel Club, Inc.*, 8 F.L.W., (Fla. April 14, 1983), in which the Court stated it did not matter that the legislature was aware the bill would benefit a certain business, Plaintiff has abandoned this obligation. Plaintiff had originally

prayed for attorneys fees pursuant to 42 U.S.C. 1983 and 1988, which issue this court ruled against in a hearing May 11, 1983.

5. Plaintiff Delta Airlines is a Delaware corporation registered to do business in Florida and certified by the Civil Aeronautics Board. They operate from 9 airports in Florida and employ approximately 4,000 employees. Intervenors are various airlines subject to the fuel tax whose appregate employees number approximately 1,800. None of the intervenors are qualified to receive the Chapter 220 tax credit either because of size or location outside Florida. Delta claims irreparable injury of $9.7 million per year without retroactive interest if Senate Bill 8-A is declared unconstitutional, prolonged legal proceedings, invidious discrimination without remedy, and competitive advantage to other classes of common carriers and Florida-based corporations. For these reasons, Plaintiff requests an immediate temporary injunction followed by a permanent injunction and declaratory relief.

6. Defendant DOR contends Senate Bill 8-A is a valid tax measure reasonably related to the legitimate state purpose of stabilizing tax structures and therefore is not subject to the constitutional infirmities urged by Plaintiff. Defendant contends that it has long been established that sales and use taxes imposed for the privilege of engaging in business in the state are valid. *Gaulden v. Kirk*, 47 So.2d 567 (Fla. 1950); *Kirk v. Western Contracting Company, Inc.*, 216 So.2d 503 (Fla. 1 DCA 1968), cert. den. 225 So.2d 535, app. dism. 226 So.2d 815: *Florida Revenue Commission v. Maas Brothers, Inc.*, 226 So.2d 849 (Fla. 1 DCA 1969), cert den. 237 So.2d 177. Plaintiff elaborates on the point that Senate Bill

8-A is a user fee and not fairly related to the airlines use of public facilities or roads. However, as Defendant points out, this is an excise tax, not a user fee, and "the constitutional power to levy taxes does not depend upon the enjoyment of the taxpayer of any special benefit from the use of the funds." *Nashville, Chattanooga, & St. Louis Railway v. Wallace*, 288 U.S. 249 (1933) at page 269.

EQUAL PROTECTION

The three main areas of Plaintiff's complaint in the equal protection area are: partial exemptions to other common carriers, predetermined price unrelated to actual price of aviation fuel, and discriminatory tax credit structure.

First, Plaintiff asserts that all common carriers should be treated alike and airlines should also receive the prorated treatment under Chapter 212 that other common carriers receive. Plaintiff cites cases to support this assertion that interstate carriers are "similarly situated" for tax purposes, *Seaboard Air Lines Ry. v. Simon*, 47 So. 1001 (Fla. 1908) where all carriers are liable for lost or damaged goods; *Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment*, 347 U.S. 590 (1954) that imposition of taxes on aircraft must be the same as for riverboats; *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169 (1949) that water transportation taxed same as other carriers; *Delta Air Lines, Inc., v. State of Alabama*, No. CV-1162 (Cir. Ct. Montgomery, Ala. May 27, 1981) that airlines are not utilities and receive the same treatment as other transportation modes. Defendant counters that states have wide latitude in taxation and creating classifications.

In *Madden v. Kentucky*, 309 U.S. 83 (1940) the Supreme Court stated at page 88:

> "In taxation even more than in other fields, legislatures possess the greatest freedom of classification."

The Supreme Court has upheld tax classification in ad valorem taxation of corporations, *Lehnhausen v. Lakeshore Auto Parts Co.*, 410 U.S. 356 (1973), reh. den. 411 U.S. 910; and exempting non-residents from ad valorem taxes on merchandise held in warehouses, *Allied Stores of Ohio v. Bowers*, 348 U.S. 522 (1959), where the Court states there is "no iron rule of equality prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation", p. 526.

The courts of Florida have followed *Lehnhausen*, *Madden*, and *Allied Stores* in *Markham v. Yankee Clipper Hotel, Inc.*, et al., 427 So.2d 383 (Fla. 4th DCA, 1983); and in *Just Valuation & Taxation League, Inc. v. Simpson*, 209 So.2d 229 (Fla. 1968), in which the Florida Supreme Court states at p. 232:

> "the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it."

The Florida Supreme Court has upheld the constitutionality of Chapter 212 in *Gaulden v. Kirk*, 47

So.2d 567 (Fla. 1950) where a 3% tax was imposed on rentors and lessors of living quarters, but accommodations rented for longer than 6 months and two-family apartment buildings were exempt. The court held this to be a reasonable classification. Likewise the distinction between airlines and other carriers is a reasonable classification and Plaintiff has not sustained its burden to "negative every conceivable basis which might support it". *Just Valuation*, supra.

Plaintiff maintains that this distinction is arbitrary and unreasonable and will not pass constitutional muster, citing *Hartford Steam Boiler Inspection and Insurance Co. v. Harrison*, 301 U.S. 459 (1937), to support the allegation that two different forms of business cannot be treated differently. Plaintiff states that airlines and common carriers have been treated similarly for fuel tax purposes since 1963, and that the new bill singles out airlines to pay a disproportionate share of tax. However, Plaintiff does not sustain its burden to demonstrate this classification is "hostile and oppressive" per *Just Valuation*, and this court therefore holds there is no invidious discrimination by creation of an arbitrary classification. Classifying airlines differently from vessels and railroads for fuel tax purposes is not arbitrary. Airlines enjoy advantages and must tolerate some disadvantages due to their distinctive nature. For example, airlines enjoy the advantage of being exempt from ad valorem taxes on the lease of property from the county or other governmental unit pursuant to Chapter 80-368. Vessels and railroads are not exempt. Even though Plaintiff argues that 80-368 also benefits hotels, restaurants, and racetracks, it does not object to this favorable classification and only when

disadvantaged does Plaintiff object. Also, pro-ration of mileage for aircraft has proven difficult in the past because of flight patterns over the Gulf of Mexico and Atlantic Ocean to avoid accumulation of intrastate mileage. Defendant approximates that in the past airlines were paying only about 6% of their actual tax due to these flight patterns to avoid flying over the state.

Second, Plaintiff asserts the predetermined price of $1.148 per gallon is not related to the actual price of aviation fuel which customarily is less expensive and at the time of writing was about $.90 per gallon. Plaintiff would have the DOR adjust the price as market price fluctuates and tax aviation fuel at the lower rate. This suggestion is not feasible because of the varying prices in different locations, the volatile nature of gas prices, and the objective of the legislature to have a stabilized tax structure. Rather than discriminate against airlines, the legislature has imposed a set price per gallon and all consumers are taxed equally regardless of nature of transport. The tax is levied on first withdrawal from the storage tanks and not at the retail level which latter price would be relatively impossible to ascertain. Plaintiff urges the court to allow the airlines to self-assess taxes as in the past and insists there have been no problems previously. However, as DOR points out, the discrepancy in self-assessment renders this point meritless. For the foregoing reasons, this court holds the predetermined price structure does not invidiously discriminate against airlines.

Third, Plaintiff maintains the Chapter 220 tax credit structure favors local business and disadvantages foreign corporations registered in Florida but without a home office there. Plaintiff cites *Department of Revenue v.*

Amrep, 358 So. 2d 1343 (Fla. 1978) for the proposition that once a corporation is admitted to be registered in a state, it enjoys the full equal protection of the law. This is true, but it also must bear the cost of being privileged to do business in the state. Plaintiff contends that state attempts to tax foreign corporations more stringently than domestic corporations have been invalidated in *Wheeling Steel Corporation v. Glander*, 337 U.S. 562 (1949) dealing with intangible tax on accounts receivable; and *WHYY, Inc. v. Borough of Glassboro*, 393 U.S. 117 (1968) which afforded out-of-state non-profit corporations tax exemptions equal to domestic non-profit corporations; and *O'Connell V. Kontojohn*, 179 So. 802 (Fla. 1938) which invalidated a discriminatory Pensacola tax based on non-city residents who operated bakery trucks in that city. However, the Senate Bill 8-A tax credit is valid because there is a rational basis behind allowing such credit for domestic corporations: encouraging foreign corporations to establish home offices in Florida. Further, the Supreme Court states in *Carmichael v. Southern Coal & Coke Company*, 301 U.S. 495 (1936) at page 509:

> "The legislature is not bound to tax every member of a class or none, but may make distinctions of degree having a rational basis."

Therefore, if the legislature reasonably believes a tax credit for domestic corporations will further its objective of encouraging in-state incorporation, it may afford this more favorable treatment without discrimination. Just as the legislature enjoys wide latitude in taxation and classifications, it has wide latitude in promoting business where the public interest is served. *Carmichael* at page 512. In *Sanford-Orlando Kennel Club*, supra,

the Florida Supreme Court states that the legislature may benefit a certain class so long as it is not unreasonable. There is no unreasonable burden on airlines to establish a home office in Florida if they wish to receive a tax credit. Also, this tax credit is on corporation income tax, not on the sales tax, so a corporation must first pay corporate income tax to avail itself of the Chapter 220 credit. For these reasons, this court holds the tax credit does not favor local business nor discriminate against foreign corporations.

COMMERCE CLAUSE

Plaintiffs contend that Senate Bill 8-A is a state attempt to regulate commerce between the states and exceeds state limitations pursuant to the United States Constitution, Article I, Section 8, Clause 3 grant to Congress. Assuming this bill affects interstate commerce, the state tax must meet the four prongs of *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), set out on page 278 of that opinion:

1) activity taxed has a sufficient nexus with the State,
2) the tax may not discriminate against interstate commerce,
3) the tax must be fairly apportioned; and
4) the tax must be related to services provided by the state.

Plaintiff contends that Senate Bill 8-A fails at least two prongs of this test because this is a road use tax unrelated to airline services, and because the tax is not fairly

apportioned and favors certain carriers and local businesses. Plaintiff insists this is a "user" tax because Governor Graham called this session to raise $250 million to fund road construction and maintenance. However, the working of section 206.46 specifically eliminated reference to "construction and maintenance of state roads" in allocation funds from the State Transportation Trust fund into which the fuel taxes are deposited. Instead, the section is worded to provide funds for "transportation purposes" which includes airports and aircraft services, contrary to the assertion of Plaintiff. Plaintiff maintains that because these funds are used for roads and airlines do not use roads, the tax is unrelated to services provided by the state. This is obviously not the case, as the legislature expressly included all transportation purposes in the allocation of funds.

Plaintiff attempts to convince the court that this is a user tax and not an excise tax and is therefore subject to a higher standard of scrutiny. This argument is flawed. As previously noted, favoring local businesses is not necessarily unreasonable or arbitrary. In the case of the Chapter 220 tax credit, Plaintiff is not unreasonably disfavored as there is a legitimate state purpose in encouraging corporate home offices to locate in Florida and to otherwise attract industry to the state. Plaintiff can merely incorporate in Florida if it wishes to receive the credit. Use of public airport facilities is a privilege the airlines enjoy and they should share the cost of these facilities so long as the cost is reasonable. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981) supports this statement and goes on to say that courts should not inquire into the amount of the tax or value of benefit received. In *Montana*, a severance tax

on coal mined in Montana was upheld as a general revenue tax even though 90% was shipped out of state. Plaintiff tries to distinguish this case, saying Senate Bill 8-A is a use tax. However, this distinction does not withstand scrutiny. The court in *Montana* made it very clear that a state can regulate interstate commerce so long as there is no discrimination. In the case at bar the tax is levied upon all consumers equally based on the quantity of fuel withdrawn and there is no discrimination. The Supreme Court of the United States also deferred to the legislature in establishing tax measures in *Montana*. In *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), a "use" charge for enplaning passengers was upheld as rationally related to the use of facilities, even though such charge was "imperfect". Therefore, even if the Florida fuel tax were considered a use tax, this tax is valid because the funds are allocated for "public transportation" including air facilities, and according to *Montana* the benefit does not have to be measured with mathematical accuracy. The *Complete Auto* test prong #4 does not require a proportional relation of tax to benefit receive, but only requires that the tax be related to the services provided. *Complete Auto* also states that interstate commerce must pay its own way, similar to the reasoning in *Montana*.

To support its contention that Senate Bill 8-A favors local business by extending a tax credit only to Florida-based corporations, Plaintiff cites *Maryland v. Louisiana*, 451 U.S. 725 (1981) where a tax on natural gas pumped out-of-state created a burden on interstate commerce. Here the tax is on fuel purchased in the state and all consumers are taxed equally so there is no

similar burden on interstate commerce. *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977) involves a New York statute which taxed out-of-state transfers. Here the legislature is not trying to tax any out-of-state transaction. In *Archer Daniels Midland Co. v. State*, 315 N.W2d 597 (Minn. 1982), a tax exemption for gasohol produced from Minnesota products with no comparable exemption for out-of-state product production, was declared invalid as a restriction on interstate commerce. Senate Bill 8-A in no way affects out-of-state production or consumption. The Florida Supreme Court has upheld special tax exemption to encourage Florida industry. *Faircloth v. Mr. Boston Distiller Corp.*, 245 So.2d 240 (Fla. 1970). This court likewise finds there is no burden on interstate commerce by Senate Bill 8-A and no violation of the Commerce Clause.

IMPROPER DELEGATION OF LEGISLATIVE AUTHORITY

Intervenor Eastern Airlines raises an additional point that Senate Bill 8-A is an improper delegation of legislative authority by allowing the DOR to determine the fuel fixed price after June 1, 1985. *Gindl v. Department of Education*, 396 So.2d 1105 (Fla. 1979, corrected on rehearing 1981) allows the Department of Education to appropriate state funds to a state agency based on the Florida Price Level Indix. The method of appropriation in Senate Bill 8-A is equivalent to the *Gindl* method and is a proper delegation of authority.

SEVERABILITY

Both parties agree that this bill should not be severed in part. Additionally, there is no severability

clause in the bill. However, in view of the rulings made herein, it is unnecessary to consider or determine any questions of severability.

ACCORDINGLY, IT IS FURTHER ORDERED AND ADJUDGED:

A. This Court finds and determines that Chapter 83-3, Laws of Florida, also referred to as Senate Bill 8-A, is a valid enactment and is not in conflict with the Equal Protection clauses of the United States Constitution (14th Amendment) nor the Florida Constitution (Article I, Section 2); nor with the Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3).

B. It is further found that the reference to the Consumer Price Index in future applications of the price per gallon to be used in computing the tax is not an unlawful delegation of legislative power. The Consumer Price Index is a computation by governmental agency of average prices of items of commerce. Reference to this measure is not a delegation of legislative discretion but an economic computation relied upon to apply a legislative policy of a tax based upon an approximate price prevailing at a given time.

C. All challenges to the validity of this statute are found to be without merit.

D. All prayers that the Defendant Department of Revenue be restrained from enforcement of Chapter 83-3 or collecting taxes imposed thereon are hereby denied.

E. The Amended Complaint and this cause be and the same are hereby dismissed finally.

DONE AND ORDERED, this 23rd day of May, 1983.

/s/ Ben C. Willis

Ben C. Willis
Circuit Judge

APPENDIX C

ORDER ON REHEARING

IN THE SUPREME COURT OF FLORIDA

WEDNESDAY, SEPTEMBER 12, 1984

CASE NO. 63,949

Circuit Court Case No. 83-855
(Leon)

EASTERN AIR LINES, INC.,
Appellant,

vs.

DEPARTMENT OF REVENUE,
Appellee.

On consideration of the motion for rehearing filed by attorneys for appellant, and response thereto,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

BOYD, C.J., ADKINS, OVERTON, ALDERMAN, McDONALD and SHAW, JJ., Concur

APPENDIX D

NOTICE OF APPEAL

Filed November 28,1984

SUPREME COURT OF FLORIDA

CASE NO. 63,949

EASTERN AIR LINES, INC.,
a Delaware corporation,

Appellant,

vs

STATE OF FLORIDA,
DEPARTMENT OF REVENUE,

Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that EASTERN AIR LINES, INC., the Appellant above named, hereby appeals to the Supreme Court of the United States from the final order and Judgment of the Supreme Court of Florida rendered on September 12th, 1984, denying Appellant's Motion for Rehearing, and its decision rendered on June 14, 1984, affirming the Final Judgment of the Circuit Court in and for Leon County, Florida, dismissing the Appellant's Complaint against the Appellee.

This appeal is taken is taken pursuant to Title 28, United States Code, Section 1257, subparagraph 2.

KIMBRELL, HAMANN, JENNINGS,
WOMACK, CARLSON & KNISKERN, P.A.
Suite 900, Brickell Centre
799 Brickell Plaza
Miami, FL 33131

By /s/ Joseph F. Jennings
Joseph F. Jennings
Attorneys for Appellant

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Appeal to the Supreme Court of the United States was mailed to LARRY LEVY, ESQ., General Counsel, Department of Revenue, Room 102, The Carlton Building, Tallahassee, FL 32301, and JOSEPH C. MELLICHAMP, ESQ., Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, FL 32301, this 26th day of November, 1984.

KIMBRELL, HAMANN, JENNINGS,
WOMACK, CARLSON & KNISKNER, P.A.
By /s/ Joseph F. Jennings
Joseph F. Jennings
Attorneys for Appellant

APPENDIX E

LIST OF PARTIES

CORPORATE PARTY'S AFFILIATIONS

Apart from Appellant's several wholly owned subsidiaries, Appellant is a corporation that owns an interest in other corporations, which corporations and the ownership interest are as follows:

Aeronautical Radio, Inc.	9.1%
Air Cargo, Inc.	17.6%
Air Cargo Facilities, Inc.	7.6%
Airlines Clearing House, Inc.	4.1%
Airline Tariff Publishers, Inc.	11.9%
Arizona Fuel Facilities	7.7%
Atlanta Air Terminal, Inc.	14.3%
Bradley Facilities, Inc.	9.5%
International Aeradio (Caribbean), Ltd.	5.0%
Manhattan Air Terminal, Inc.	12.5%
Portland Fuel Facilities	5.6%
Societe Int'1 de Telcom	0.5%
Tinicum Fuel Facilities Corp.	33.3%

APPENDIX F

CONSTITUTIONAL AND STATUTORY PROVISION

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

The Commerce Clause of Article I, Section 8, of the United States Constitution provides in relevant part that:

> SECTION 8. The Congress shall have Power To . . .
>
> To regulate Commerce with foreign Nations, and among the several States, . . .

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Chapter 83-3, Section 5, amending Section 212.08(4), Florida Statutes 1982

(4) EXEMPTIONS, ITEMS BEARING OTHER EXCISE TAXES, ETC.—Also exempt are water (not exempting mineral water or carbonated water), and; all fuels used by a public or private utility, including any municipal corporation or rural electric cooperative association, in the generation of electric power or energy for sale. Fuel other than motor fuel and special fuel is taxable as provided in this part, except that fuel expressly exempt herein. Motor fuels and special fuels are taxable as provided in part II, except that those used by vehicles, other than aircraft, which are licensed as common carriers by the Interstate Commerce Commission to transport persons or property in interstate or foreign commerce and vessels used to transport persons or property in interstate or foreign commerce are taxable only to the extent provided herein.

Chapter 83-3, Section 6, creating Section 212.70, Florida Statutes

§212.70 Tax imposed on sale of motor fuel and special fuel; tax upon ultimate consumer; determination by department; notification.—

(3) Prior to June 1 of each year, the department shall determine the appropriate

sales tax applicable to the retail price per gallon of motor fuel and special fuel as follows:

(a) The department shall determine the appropriate total motor fuel and special fuel retail price, including any federal, state and local excise taxes on such fuel, for the forthcoming 12-month period beginning June 1, by adjusting the initially established price by the percentage change in the average monthly gasoline price component of the Consumer Price Index, issued by the United States Department of Labor, for the most recent 12-month period ending March 31, compared to said average for the 12-month period ending March 31, 1984. However, the adjustment provided herein shall first be made for the forthcoming 12-month period beginning June 1, 1985.

(b) The tax per gallon shall be computed as 5 percent of said total retail price, rounded to the nearest one-tenth of one cent.

(c) The initially established price is $1.148 per gallon.

Chapter 83-3, Section 6, creating Section 212.92, Florida Statute

§212.92 Refunds.

(1) The following refunds shall apply to the tax imposed by this part, to the extent provided herein:

(e) Refund to farmers and fishermen.—

1. For the purposes of this paragraph, "agricultural purposes" means motor fuel or special fuel used in any tractor, vehicle, or other farm equipment which is used exclusively on a farm or for processing farm products on the farm and no part of which is used in any vehicle or equipment driven or operated upon the public highways of this state. This restriction shall not apply to the movement of farm vehicles or farm equipment between farms. The transporting of bees by water and the operating of equipment used in the apiary of a beekeeper shall be also deemed an agricultural purpose.

2. For the purposes of this paragraph, "commercial fishing purposes" shall be construed to mean motor fuel or special fuel used in the operation of boats, vessels, and equipment used exclusively for the taking of fish, crayfish, oysters, shrimp, and sponges from the salt and fresh waters under the jurisdiction of the state for resale to the public but shall in no way be construed to include fuel used for sports or pleasure fishing, no part of which is used in any vehicle or equipment driven or operated upon the highways of this state.

3. Any person who used any motor fuel or special fuel for agricultural purposes or commercial fishing purposes on which the tax imposed by this part has been paid shall be entitled to a refund of said tax.

Office-Supreme C.
FILE
FEB 4 1985
ALEXANDER L. STEVAS,
CLERK

CASE NO. 84-926

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1984

EASTERN AIRLINES, INC.
A Delaware corporation,

Appellant,

vs.

STATE OF FLORIDA
DEPARTMENT OF REVENUE,

Appellee,

On Appeal From the Supreme
Court of Florida

MOTION TO DISMISS OR AFFIRM

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POINT II. THE DECISION OF THE SUPREME COURT OF FLORIDA IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT ON THE INVOLVED ISSUES OF LAW, MANY OF WHICH ARE CITED IN THE SUPREME COURT'S DECISION, AND IT IS MANIFEST THAT THE QUESTIONS ON WHICH THE DECISION IN THIS CAUSE DEPENDS, ARE SO INSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

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MOTION TO DISMISS OR AFFIRM

Appellee moves the Court to dismiss this appeal or to affirm the decision of the Supreme Court of Florida on the following grounds:

I. This appeal does not present a substantial federal question because all issues raised by the Appellant have been foreclosed by prior decisions of this Court.

II. The decision of the Supreme Court of Florida is consistent with prior decisions of this Court on the involved issues of law, many of which are cited in the Supreme Court's decision, and it is manifest that the questions on which the decision in this cause depends, are so insubstantial as not to need further argument.

STATEMENT

This appeal is from a decision of the Florida Supreme Court upholding the constitutionality of Chapter 83-3, Laws of Florida, except for §61, which involved a Florida corporate tax credit, which is unrelated to the Florida Sales Tax Law, Chapter 212, Florida Statutes. Chapter 83-3, supra, amended Chapter 212, Florida Statutes, which is commonly referred to as the "Sales Tax Law of Florida". The statute, Chapter 212, Florida Statutes, has been construed by the Florida Supreme Court and other Florida appellate courts on numerous occasions, as being an excise tax levied on the privilege of engaging in certain businesses and transactions as provided for in the statute. Gaulden v. Kirk, 47 So.2d 567 (Fla. 1950)

Florida Revenue Commission v. Maas Brothers, Inc., 226 So.2d 849 (Fla. 1 DCA 1969); cert. den. 237 So.2d 177; Estate of W. T. Grant Co. v. Lewis, 358 So.2d 76, (Fla.1 DCA 1978); 370 So.2d 764 (Fla.1979); Kirk v. Western Contracting Company, 216 So.2d 503 (Fla. 1 DCA 1968), cert. den. 225 So.2d 535; app. dism. 226 So.2d 815; Ryder Truck Rental v. Bryant, 170 So.2d 822 (Fla. 1964); Green v. Panama City Housing Authority, 115 So.2d 560 (Fla. 1959). The decision in this cause merely restates the position of the highest Court of the State of Florida, to the effect that the excise taxes imposed under Chapter 212, Florida Statutes, are imposed on the privilege of engaging in certain businesses, and are levied on the vendor, for the exercise of such privilege.

Motor fuel and special fuel are taxable under Chapters 212, 206, and 207, Florida Statutes. These several statutes generally interface to some extent because

the Legislature has attempted to utilize the same as part of the body of law of the State of Florida to generate taxes for the operation of government and taxes for public transportation. Prior to April 1, 1983, the effective date of Chapter 83-3, supra, motor fuel and special fuel which were not subject to the 8 cents tax imposed by Chapter 206, Florida Statutes, were taxable under the sales tax law, Chapter 212, Florida Statutes, in the following manner. §212.08(4), F.S., exempted motor fuels and special fuels on which a tax was imposed by Chapter 206 or Chapter 207, Florida Statutes. Aircraft was not within the definitions found in Chapters 206 or 207, Florida Statutes, and accordingly paid no tax under either Chapter 207, Florida Statutes, or Part I or Part II of Chapter

206, Florida Statutes. Truckers, as common carriers, did pay tax under Chapter 207, F.S., and paid tax under Chapter 206, F.S., although a credit was allowed on the taxes paid under Chapter 206, F.S., if tax was paid under Chapter 207, F.S. Truck common carriers were allowed to pro-rate tax under Chapter 207, Florida Statutes. See §207.005(2), F.S.

Since the airlines paid no tax under Chapters 206 or 207, F.S., the exemption found in §212.08(4), F.S., exempting purchases of fuels which had been subjected to tax under Chapters 206 and 207, F.S., did not apply to the airlines. However, airlines did receive pro-ration under §212.08(4), F.S.

Airlines generally lease space and the right to use government owned airport facilities in Florida and at one time were required to pay ad valorem real property taxes on such use and occupancy. However, the Legislature in 1980 enacted Chapter 80-368, Laws of Florida, so as to relieve airlines from the burden of having to pay local ad valorem taxes on such leased property used for airline purposes.

Prior to the effective date of Chapter 83-3, supra, vessels and railroads, like aircraft, were allowed to pro-rate the tax by virtue of the provisions found in Chapter 212, Florida Statutes. See §212.08(4), §212.08(8), and §212.08(9), F.S. However, vessels and railroads were

not exempt from the provisions of Part I of Chapter 206, F.S., on purchases of motor fuel, but were exempt as were aircraft from the provisions of Part II of Chapter 206, F.S., and Chapter 207, F.S., both of which contained taxes on such fuel in a specified amount per gallon. Chapter 83-3, supra, removed from the statute, the authority which allowed airlines to pro-rate taxes. Truck line common carriers were required to pay both the taxes imposed under Chapter 206, F.S., and any which may be due under Chapter 207, F.S., and the new tax imposed in Part II of Chapter 212, Florida Statutes, through the enaction of Chapter 83-3, supra. Vessels and railroads continue to receive the pro-ration found in

§212.08(4), F.S., but also continue to be liable for taxes imposed under Part I of Chapter 206, F.S.

Although Appellant argues strenuously that the tax imposed under Chapter 212, Florida Statutes, is a user fee or user tax, and although Appellant submitted evidence and testimony with regard to same in the Trial Court, this contention was rejected by the Trial Court both factually and legally. Although the Appellee does not agree that such question is a factual issue, and in fact, in another case pending on appeal involving the same statute,[1] no testimony was taken. Even if such were a factual issue, it has been resolved against

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[1]Northeastern Airways, Inc., and Arrow Air, Inc., v. State of Florida, Department of Revenue. Case No. 84-929

the evidence and testimony presented by the Appellant, by the Trial Court which is the trier of fact, and affirmed by the Florida Supreme Court.

Virtually all of the Appellant's argument is premised on the false assumption that the taxes imposed under Chapter 212, Florida Statutes, are user fees. This is not, and never has been true.

POINTS I AND II

POINT I. THIS APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION BECAUSE ALL ISSUES RAISED BY THE APPELLANT HAVE BEEN FORECLOSED BY PRIOR DECISIONS OF THIS COURT.

POINT II. THE DECISION OF THE SUPREME COURT OF FLORIDA IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT ON THE INVOLVED ISSUES

OF LAW, MANY OF WHICH ARE CITED IN THE SUPREME COURT'S DECISION, AND IT IS MANIFEST THAT THE QUESTIONS ON WHICH THE DECISION IN THIS CAUSE DEPENDS, ARE SO INSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

Both these points will be considered together.

A. THE TAX IS AN EXCISE TAX, NOT A USER FEE.

The highest Court in Florida has construed the statute, Chapter 212, Florida Statutes, as a statute imposing a tax on vendors for the privilege of engaging in business and exercising the taxable events and transactions provided for therein. Gaulden v. Kirk, 47 So.2d 567 (Fla. 1950); Green v. Panama City Housing Authority, 115 So.2d 560 (Fla. 1959); Ryder Truck Rental v. Bryant, 170 So.2d 822 (Fla. 1964). This determination by the Florida Supreme Court is consistent with similar determinations

which have been made by this Court on numerous occasions when analyzing and determining the type of tax imposed by state law and in determining the legal incident which gives rise to such tax. See Edelman v. Boeing Air Transport,Inc., 289 U.S. 249 (1933), Eastern Air Transport, Inc., v. South Carolina Tax Commission, 285 U.S. 147 (1932) and United Airlines v. Mahin, 410 U.S. 623 (1973).

In Eastern Air this Court considered a statute extremely similar to Chapter 212, Florida Statutes. (See footnote at page 151 of said decision, where the statute is quoted in its entirety.) In that case, the Court pointed out that the tax was imposed against the dealer for the privilege of carrying on the business of selling

gasoline within the state. In Boeing Air, the tax was imposed at the time the gasoline was withdrawn from the tanks for use in the aircraft. The statute in the case at bar imposes a tax on the legal incident of sale or transfer and collects same on such first sale or transfer which is generally the first withdrawal from storage for use. In the Mahin case, the tax involved was a general revenue use tax applying to the privilege of using tangible personal property in the state. The tax involved in that case, was imposed on the legal incident of storage or withdrawal from storage of the fuel. This Court upheld the state taxes in all such cases and the decision of the Florida Supreme Court in the instant case has reached a

similar conclusion in upholding the Florida statute. Thus, the Florida Supreme Court's decision is consistent with the decisions of this Court interpreting similar statutes from other states. Accordingly, this appeal does not present a substantial federal question, and based on the decisions reached by this Court in the aforementioned cases, it is manifest that the questions on which the decision in this cause depend are so insubstantial as not to need further argument. This Court has held that on appeal from a State Court judgment in an action challenging the constitutionality, the United States Supreme Court will defer to the State Court's determination that the taxable event is storage rather than the consumption of the fuel, where

there is no reason to ignore or to disagree with such determination. United Airlines v. Mahin, 410 U.S. 623 (1973); United States v. Burnison, 339 U.S. 87 (1950). In this case, the Supreme Court of Florida has construed the tax imposed under Chapter 212, Florida Statutes, as an excise tax, imposed on the vendor for the privilege of engaging in business, and has held, based on the statutory language, that the tax is imposed on the incident of the first sale or transfer within the State, which generally occurs on the first withdrawal or withdrawal for use from storage of the fuel. This is significant because the Appellant's argument is premised on the statement that the Supreme Court of Florida erred in concluding that the tax imposed

was a sales tax imposed on the vendor for the privilege of engaging in business, instead of a user fee. The cases cited by the Appellant are cited for authority premised on the false assumption that the tax imposed is a user fee.

This Court in its decision in Commonwealth Edison Company v. State of Montana, 453 U.S. 609, (1981) pointed out the distinction and stated that those cases in which the Court reviewed challenges to "user" fees or taxes must be put aside and cited the case relied upon by the Appellants, Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc., 405 U.S. 707 (1972). The decision of the Florida Supreme Court recognized this distinction, and cited both the Montana

case, and the Evansville case, and properly applied the distinction as drawn by this Court in the Montana case. Thus, the Florida Supreme Court's decision is consistent with this Court's prior decisions in both cases. It specifically held that the tax was unlike the true "user fee" or "user tax". The Florida Supreme Court's determination that the involved tax is an excise tax and not a user fee, should be binding and controlling on this issue.

B. INTERSTATE COMMERCE

The Florida Supreme Court's determination that the tax is an excise tax and not a user fee is actually decisive in part of the Appellant's argument with regard to the four prong test cited in Complete Auto Transit, Inc., v. Brady, 430 U.S. 274 (1977). The Florida Supreme Court's decision cites the Brady case, listed each

of the four prongs and considered and applied each of same adversely to the contentions argued by the Appellant. Appellants contended that the tax offended the last two prongs of the test set forth in Brady, in that it discriminated against interstate commerce and was not fairly related to the services provided by the State. The Florida Supreme Court rejected this, and properly so.

The Appellant's contention that the tax is not fairly related to the services provided by the State misconceives the nature of the tax imposed under Chapter 212, F.S., and is premised on the false assumption that the imposition is a user fee instead of an excise tax. This has

been discussed previously and it has been pointed out that under this Court's previous decisions, no specific inquiry is required into whether or not the tax is fairly related to the services provided by the State, where the State must demonstrate a specific or direct benefit flowing when, as in the instant case, the tax is a general revenue tax such as that imposed under Chapter 212, Florida Statutes, as amended by Chapter 83-3, supra. In this Court's decision in the Montana case, it recognized that the only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privilege of living in an organized society, established and safeguarded by the devotion of taxes to public purposes.

This Court reached a similar decision in the case of Carmichael v. Southern Coal & Coke Company, 301 U.S. 495 (1937), so the Appellants' contention that a specific judicial inquiry is required in which an amount of specific benefit may be ascertained, has already been foreclosed and resolved against the Appellants' contention by this Court in other decisions. The Florida Supreme Court's decision is consistent with these decisions of this Court and accordingly no substantial federal question exists.

With regard to the Appellant's contention that the statute singles out airlines and classifies them improperly, this contention too has already been re-

solved by decisions of this Court adverse to the contentions of the Appellants. In this Court's decision in Nashville, Chattanooga, & St. Louis Railway v. Wallace, 288 U.S. 249 (1933), the Supreme Court upheld a state statute imposing an excise tax on the privilege of engaging inthe gasoline business, the proceeds of which were used solely for construction and maintenance of highways. The railway contended that since it was a railway and did not use the state highway system, that the statute discriminated against it. The rail carrier purchased large quantities of gasoline outside of the State of Tennessee and brought them into the State in tank

cars from which it was unloaded and stored in the railway's own storage tanks. None was sold by the railway but all was withdrawn and used by it as a source of motor power in interstate railway operation in Tennessee, Kentucky, Alabama, or Georgia. The Court held that the allegations of the railway showing a heavier burden of taxation imposed upon railroads than upon common carriers by motor bus, fell short of alleging discrimination forbidden by either the Commerce Clause or the Fourteenth Amendment. Furthermore, it should be remembered that other competing carriers engaging in interstate commerce, are required to pay other taxes on purchases of fuel under Chapters 206 and

207, Florida Statutes, which are not imposed upon airlines. All airlines pay the same tax as would be imposed on an individual person purchasing fuel from a service station. This is so because the tax is on the first withdrawal or use and is collected on the first transfer, and since this legal incident can occur only once, it would not be subject to tax any place else and thus could not unfairly burden or discriminate against interstate commerce. Since this legal incident can occur only once, as this Court stated in Montana, there can be no question regarding apportionment or potential multiple taxation. Substantial nexus clearly exists and since there is no danger of multiple taxation, because the legal incident of withdrawal and first transfer can occur

only once, both the first and second prongs of the Brady test are met. Furthermore, there is no singling out interstate business because the same tax is imposed on the first transfer of fuel, whether it is to be used in intrastate, interstate or foreign commerce or transportation.

That a state may classify persons and property for tax purposes has been uniformly recognized by this Court in numerous of its decisions, many of which were cited and relied on by the Florida Supreme Court in its decision. Basically, the Appellant is contending that it should be allowed to apportion the taxes imposed under Chapter 212, Florida Statutes, but the Florida Supreme Court's decision that such was not required is amply supported by the decisions of this Court. See Allied Stores

of Ohio v. Bowers, 358 U.S. 522 (1959); Madden v. Kentucky, 309 U.S. 83 (1948); Carmichael, Wallace, and Montana. Airlines certainly benefit from a good road transportation system, and as the Florida Supreme Court pointed out Appellant operates in many of the major airports throughout the State, operating a commercial airline for profit. The persons and property which are transported through the air by airlines do not come to rest at the airports, but must generally use the public roads and highways of the State in automobiles or trucks, or some other means of public transportation to arrive at their ultimate destination. The Florida Supreme Court applied all the prongs of the four prong test set forth in Brady in precisely the same manner as they have been applied by this Court in its decisions. Thus, the

Florida Supreme Court's decision is consistent with this Court's decisions and the federal question presented is plainly insubstantial. Furthermore, as the Florida Supreme Court noted in its' decision in Eastern Airlines v. State of Florida, Department of Revenue, 465 So.2d. 311 (1984), pro-ration of mileage for aircraft has proven difficult in the past because of flight patterns over the Gulf of Mexico and the Atlantic Ocean which permits airlines to avoid the accumulation of intrastate mileage.

With regard to the Appellant's contention that the rate applied violates the Commerce Clause, this contention is wholly without merit. The statute imposes the tax at a fixed rate of 5% on a fixed price per gallon of $1.148. The purpose of this is because the tax can only be effectively

collected on its first withdrawal from storage or distribution and at that time the wholesalers do not know the ultimate retail price to be set by the retailers. Thus, by fixing a price per gallon, the statute can be readily administered and the tax collected. Furthermore, the Legislature could just as easily have established the rate at a fixed amount per gallon sold, such as 6 cents per gallon or 9 cents per gallon and although the price charged per gallon may differ, the amount of tax collected would be the same. In fact, a license tax imposing a flat rate of 6 cents per gallon was upheld by this Court in Eastern Air Transport. The Supreme Court's decision is consistent with this Court's pronouncement in the Montana

case which held that the appropriate level or rate of taxation is essentially a matter for legislative and not judicial resolution. As this Court recognized in Carmichael, administrative convenience and expense in the collection and measurement of the tax are alone a sufficient justification for the difference between treatment. §212.70(2), Florida Statutes, contains the legislative finding as to convenience and necessity. Thus, the Appellant's contentions are plainly insubstantial. All air transport and individual persons in Florida pay the same tax on the purchase of fuel in Florida without regard to the fact that the fuel may ultimately be used in a vehicle which may be leaving the State. This is so because the tax is on the first

withdrawal or use and is collected on the first transfer. Furthermore, since this legal incident can occur only once, it would not be subject to tax any place else and thus could not unfairly burden or discriminate against interstate commerce. Second, since the tax is an excise tax on the privilege of engaging in the business of selling special fuel and motor fuel, and not a user fee, it is not necessary to examine and determine if there is a direct benefit flowing to the Appellant. Thus, the Supreme Court's decision is squarely consistent with this Court's decision in Montana and in this Court's application of the four prong test set forth in Brady.

The Supreme Court's determination that

the tax is on the legal incident of withdrawal for use from storage is also consistent with this Court's decision in Eastern Air Transport, Inc., v. South Carolina Tax Commission, 285 U.S. 147 (1932), Edelman v. Boeing Air Transport, Inc., 289 U.S. 249 (1933), Nashville, Chattanooga, & St. Louis Railway v.Wallace 288 U.S. 249 (1933). and United Airlines v. Mahin, 410 U.S. 623. (1973) These cases recognized that the legal incident which gave rise to the taxes imposed was on the withdrawal from storage or use and sustained the taxes involved in all three cases. Thus, the Florida Supreme Court's decision is consistent with these prior United States Supreme Court decisions, and accordingly no substantial federal question

exists, and it is manifest that the questions on which the decision in this cause depends are so insubstantial as not to need further argument.

C. EQUAL PROTECTION CLAUSE

The Florida Supreme Court held that no violation of the Equal Protection Clause occurred and this decision is consistent with the decisions of this Court dealing with legislative classification for tax purposes. The test to be applied in examining the state classification, has been set forth by this Court in several cases including Madden, Allied Stores, and Carmichael. The Florida Supreme Court cited and applied these cases. Furthermore, virtually the identical issue was before this Court in the Wallace case,

where the objection was made that a heavier burden of taxation was imposed upon railroads than upon common carriers by motor bus, and that the tax was earmarked for roads which the railroads did not use. As has been previously demonstrated herein, other common carriers traveling by road, water, or railway, pay fuel taxes which are not required to be paid by airlines, and do not enjoy certain relief from imposition of ad valorem taxes as is enjoyed by airlines.

The Florida Supreme Court's decision is consistent with these decisions of this Court and accordingly the questions raised are plainly insubstantial.

The contention that airlines are discriminated against because a refund is pro-

vided in §212.92, F.S., to farmers and fishermen is wholly without merit. Under no stretch of the imagination could such be considered to be competing with airlines and the legislative classification is imminently correct, under this Court's previous decisions which provide that state legislatures possess the greatest freedom in classification and that the legislature is not bound to tax every member of a class or none but may make distinctions of a degree having a rational basis. Farmers and fishermen bear no similarity to airlines and certainly do not compete with them in interstate commerce.

CONCLUSION

For all of the above and foregoing reasons, the Appellee urges the Court to

grant its Motion to Dismiss the appeal or to affirm the decision of the Supreme Court of Florida, because this appeal does not present a substantial federal question inasmuch as the decision of the Supreme Court of Florida is consistent with prior decisions of this Court, and it is manifest that the questions on which the decision in this Cause depends are so insubstantial as not to need further argument.

Respectfully submitted,

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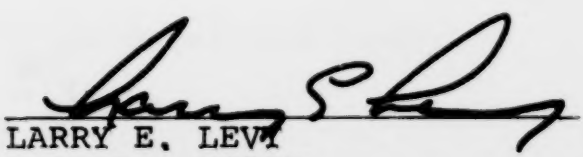
PROOF OF SERVICE

I, LARRY E. LEVY, depose and say that I am Counsel of Record for Appellee, State of Florida, Department of Revenue, and that on February 1, 1985, I served a copy of the foregoing Motion to Dismiss or Affirm on each of the parties required to be served herein as follows:

On Appellant, EASTERN AIRLINES, INC., by mailing copies in duly addressed envelopes, with first class postage prepaid, to Charles A. Kimbrell, Kimbrell, Hamann, Jennings, Womack, Carlson & Kniskern, P.A., Suite 900 Brickell Centre, 799 Brickell Plaza, Miami, Florida 33131.

All parties required to be served have been served.



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Nos. 84-921, 84-926 and 84-929

In the Supreme Court of the United States

OCTOBER TERM, 1985

NORTHEASTERN INTERNATIONAL AIRWAYS, INC., AND ARROW AIR, INC., APPELLANTS

v.

FLORIDA DEPARTMENT OF REVENUE

EASTERN AIRLINES INC., APPELLANT

v.

FLORIDA DEPARTMENT OF REVENUE

DELTA AIR LINES, INC., APPELLANT

v.

FLORIDA DEPARTMENT OF REVENUE

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a sales tax imposed by Florida on aviation fuel purchased within that State violates the Interstate Commerce Clause.

2. Whether Florida's scheme of fuel taxation violates the Equal Protection Clause by treating airlines differently in some respects than other carriers.

3. Whether the Florida Supreme Court erred in determining that appellant in No. 84-926 lacks standing under Florida law to challenge the validity of a tax statute governing tax refunds to certain farmers and fishermen.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-921

NORTHEASTERN INTERNATIONAL AIRWAYS, INC., AND ARROW AIR, INC., APPELLANTS

v.

FLORIDA DEPARTMENT OF REVENUE

No. 84-926

EASTERN AIRLINES INC., APPELLANT

v.

FLORIDA DEPARTMENT OF REVENUE

No. 84-929

DELTA AIR LINES, INC., APPELLANT

v.

FLORIDA DEPARTMENT OF REVENUE

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

OPINIONS BELOW

The opinion of the Florida Supreme Court in No. 84-921 (J.S. App. 1a-4a) is unreported. The opinion of the Florida Supreme Court in No. 84-926 (J.S. App. 2-14) is reported at 455 So. 2d 311. The opinion of the Florida Supreme Court in No. 84-929 (J.S. App. 1a-12a) is reported at 455 So. 2d 317. The opinions of the Broward County Circuit Court (84-921 J.S. App. 6a-19a) and of the Leon County Circuit Court (84-926 J.S. App. 15-16; 84-929 J.S. App. 25a-37a) are unreported.

JURISDICTION

The judgment of the Florida Supreme Court was entered in each case on June 14, 1984. Timely motions for rehearing were denied in each case on September 12, 1984 (84-921 J.S. App. 20a; 84-926 J.S. App. 33; 84-929 J.S. App. 24a). Notices of appeal in the Florida Supreme Court were filed respectively on December 6, 1984 (84-921 J.S. 11; J.S. App. 80a-81a), on November 28, 1984 (84-926 J.S. App. 34-35), and on October 30, 1984 (84-929 J.S. App. 48a-49a). The jurisdictional statement in No. 84-921 was filed on December 10, 1984, and the jurisdictional statements in Nos. 84-926 and 84-929 were filed on December 11, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(2).

STATEMENT

1. Florida for many years has imposed a variety of taxes on different types of fuel purchased within that State. Prior to April 1, 1983, gasoline and diesel fuel were subject to an excise tax at the flat rate of 8¢ per gallon. Fla. Stat. Ann. § 206.01 *et seq.* (West 1971). This tax was paid principally by individual motorists, bus lines, and trucking companies. Other carriers, such as railroads, maritime shipping companies, and airlines, were exempt from this tax. Instead, they paid the general sales tax—technically imposed on the seller for the privilege of doing business in Florida, but required to be passed on to purchasers—at a rate of 5% of the fuel's retail price. *Id.* §§ 212.05, 212.07. The sales tax, as applied to fuel purchased by these carriers, was prorated on a mileage basis. That is, a carrier paid only that portion of the otherwise-payable tax that represented the ratio of its Florida mileage to its total mileage for the previous fiscal year. *Id.* § 212.08(4)

Effective April 1, 1983, Florida amended its fuel tax regime in the following relevant respects:

(a) The scheme governing railroads and maritime shipping companies remained basically the same. They continued to pay the 5% general sales tax on the actual price of the fuel they purchased, and their tax continued to be prorated on a mileage basis.

(b) The scheme governing roadway users was changed considerably. Gasoline and diesel fuel remained subject to the flat excise tax, but the rate was reduced from 8¢ to 4¢ a gallon (84-926 J.S. App. 3). In addition, gasoline and diesel fuel were made subject, for the first time, to the 5% general sales tax (Fla. Stat. Ann. § 212.62 (West Supp. 1985)). Rather than being applied to the actual retail price, however, the 5% levy was applied in the case of gasoline and diesel fuel to an "initially established price" of $1.148 per gallon (*id.* § 212.62(3)(c)). This "initially established price" was to be adjusted for inflation beginning June 1, 1985 (*id.* § 212.62(3)(a)). No provision was made for prorating the sales tax, as applied to gasoline and diesel fuel, on the basis of mileage. See *id.* § 212.08(4). Thus, the aggregate tax burden on these items was effectively increased from 8¢ a gallon to 9.7¢ a gallon.

(c) The scheme governing airlines was also changed considerably. They remained exempt from the flat excise tax, and they remained subject to the 5% general sales tax. However, the method of computing their sales tax liability was assimilated to the newly-established method of computing the sales tax on gasoline and diesel fuel. That is, the 5% rate was applied, not to the actual retail price of jet fuel, but to an "initially established price" of $1.148 per gallon, the same figure used for diesel fuel and gasoline. See Fla. Stat. Ann. §§ 212.02(22), 212.62 (West Supp. 1985). And the mileage proration formula, while remaining in effect for railroads and maritime shipping companies, was re-

pealed in the case of airlines. Compare Fla. Stat. Ann. § 212.08(4) (West 1971) with Fla. Stat. Ann. § 212.08(4) (West Supp. 1985). Finally, a new credit against the State's corporate income tax was created, providing for an offset against that tax equal to one-half the carrier's fuel tax liability, up to a maximum credit of $5 million (*id.* § 220.189). This credit was made available only to air common carriers who had their home office in Florida and who maintained a work force of more than 1,200 employees in the State. *Ibid.;* see 84-929 J.S. App. 2a.

2. Appellants in these three cases are domestic airlines incorporated under the laws of various states and registered to do business in Florida (84-921 J.S. 1, 16; 84-926 J.S. 4; 84-929 J.S. App. 28a). Delta Air Lines, appellant in No. 84-929, has its home office in Georgia (J.S. 8). Northeastern International Airways and Arrow Air, appellants in No. 84-921, have their home offices in Florida but have fewer than 1,200 employees based there (J.S. App. 11a). Eastern Airlines, appellant in No. 84-926, has its home office in Florida and also has more than 1,200 employees based in that State. Appellants are principally engaged in interstate commerce, but also fly on some foreign routes (84-921 J.S. 16; 84-926 J.S. 4; 84-929 J.S. 8).

Appellants brought these actions in Florida trial court, challenging various aspects of the State's fuel tax regime under the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Interstate Commerce Clause, and on miscellaneous state-law grounds (84-921 J.S. App. 10a-11a; 84-926 J.S. App. 15-16; 84-929 J.S. App. 25a). The trial courts upheld the statute in all respects (84-921 J.S. App. 18a-19a; 84-926 J.S. App. 15-16; 84-929 J.S. App. 36a-37a). The cases were certified directly to the Florida Supreme Court (84-921 J.S. App. 1a; 84-926 J.S. App. 2; 84-929 J.S. App. 2a), which affirmed in part and reversed in part.

It rejected appellants' federal constitutional challenges to the fuel tax itself (84-921 J.S. App. 1a-4a; 84-926 J.S. App. 2-13; 84-929 J.S. App. 2a, 6a-12a). However, it sustained a challenge, mounted by carriers other than Eastern, to the constitutionality of the income tax credit, holding that the credit "clearly discriminates against interstate commerce because [it] provides a *direct commercial advantage* to Florida-based air common carriers over non-Florida-based carriers" (84-929 J.S. App. 4a, citing *Boston Stock Exchange* v. *State Tax Comm'n,* 429 U.S. 318 (1977) (emphasis in original)). The credit provision was severed from the statute (84-929 J.S. App. 6a, 12a) and the statute as thus modified was sustained. The airlines have appealed the Florida Supreme Court's judgment insofar as it is unfavorable to them; Florida has not cross-appealed as to the constitutionality of the income tax credit.[1]

DISCUSSION

1. Appellants contend that Florida's sales tax on aviation fuel places an unconstitutional burden on interstate commerce, pointing out that the fuel they buy is consumed on interstate flights and that Florida's levy is no

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[1] Florida recently enacted, effective July 1, 1985, further amendments to its scheme of aviation fuel taxation. 1985 Fla. Laws 85-348. The amendments exempt aviation fuel from sales tax, but impose upon it a new excise tax in approximately the same amount. Compare *id.* §§ 2 and 3 with Fla. Stat. Ann. § 212.62 (West Supp. 1985). The invalidated income tax credit is replaced with a provision allowing refund of the new excise tax in an amount "not [to] exceed six-tenths of one percent of the wages paid by the carrier to employees located or based within this state" (1985 Fla. Laws 85-348, § 2 (to be codified at Fla. Stat. § 206.9855)). Enactment of these amendments, which apply only prospectively (*id.* § 9), does not moot the instant appeals, which continue to present a live controversy concerning appellants' sales tax liability from April 1, 1983, to July 1, 1985. We of course intimate no view as to the constitutionality of the 1985 amendments.

longer prorated to reflect that fact. This contention is insubstantial in light of this Court's decision in *Eastern Air Transport, Inc.* v. *South Carolina Tax Comm'n*, 285 U.S. 147 (1932). The Court there upheld a nondiscriminatory, unapportioned sales tax as applied to aviation fuel purchased within South Carolina for use in interstate commerce, reasoning that the taxable event was sale of the fuel and that such sales were "purely intrastate transactions" (285 U.S. at 152). Accord, *United Air Lines, Inc.* v. *Mahin*, 410 U.S. 623, 629 (1973) (rejecting Commerce Clause challenge to state use tax as applied to aviation fuel "withdrawn from storage for consumption in an interstate vehicle"); *Edelman* v. *Boeing Air Transport, Inc.*, 289 U.S. 249, 252 (1933) (same).

Appellants attempt to dismiss these cases as "out-of-date" (84-929 J.S. 13-14) because they were decided under the "direct burden" approach to interstate commerce which this Court abandoned in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977). However, the "direct burden" approach was a doctrine that had been used mechanically to *strike down* state laws which, as drafted, technically imposed a levy on "the privilege of doing [an interstate] business" (430 U.S. at 278-279 (original quotation marks omitted)). In repudiating that doctrine, obviously, the Court cast no doubt on the continuing validity (at least as to result) of decisions that had *sustained* state taxes under the old rubric.

In any event, there is no merit to appellants' suggestion (84-921 J.S. 35-36; 84-929 J.S. 10-18) that Florida's tax fails *Complete Auto*'s "fair apportionment" or "fair relation" tests. See 430 U.S. at 279. Because the taxable event—sale of the fuel—takes place wholly within Florida, no other state could undertake to impose a tax on that transaction, and apportionment is thus not constitutionally required. Appellants' contention that Florida's tax is not "fairly related to the services

provided by the State" (*Complete Auto*, 430 U.S. at 279) is based on assertions that the tax is really a user fee, that the proceeds of the tax are devoted to road construction, and that airlines do not derive from Florida's roads a benefit proportional to the tax they pay. See 84-921 J.S. 37-39; 84-929 J.S. 11-17. As the courts below pointed out, however, each of these assertions is erroneous. See 84-921 J.S. App. 11a-12a; 84-929 J.S. App. 7a, 11a, 29a, 34a. The tax is plainly a sales tax because its legal incidence is upon the fuel seller and is imposed for the privilege of selling fuel in Florida. The proceeds of the tax are not devoted to "the construction and maintenance of state roads," as was once true (Fla. Stat. Ann. § 206.46 (West 1971)), but go into a trust fund to "be used for transportation purposes" (Fla. Stat. Ann. § 206.46 (West Supp. 1985)). And appellants do enjoy, not only the benefits of Florida's public transportation network, but also "the benefits of a trained work force and the advantages of a civilized society" (*Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 445 (1979)).[2]

2. Appellants' equal protection challenge is also insubstantial. They contend that Florida's fuel tax regime

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[2] Although appellants appear to engage in foreign as well as interstate commerce (see 84-926 J.S. 4; 84-929 J.S. 8), they did not contend in either court below that Florida's tax as applied to them violates the Foreign Commerce Clause. See, *e.g.*, 84-921 J.S. App. 2a. In a brief filed at the Court's invitation contemporaneously with this one, we express the view that Florida's tax, as applied to aviation fuel purchased by foreign airlines for use exclusively in foreign commerce, is unconstitutional under the Foreign Commerce Clause as interpreted in *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 451 (1979). See 84-902, 84-922 & 84-1041 Br. 30-35. The Court in *Japan Line* specifically declined to reach "questions as to the taxability * * * of domestically owned instrumentalities engaged in foreign commerce" (441 U.S. at 444 n.7). Since appellants did not raise this question below and consequently do not present it for review here, we have no occasion to address it.

places a heavier burden on airlines than on railroads and maritime shipping companies, since the latter (a) have their sales tax reduced by application of a mileage proration formula, a benefit airlines no longer enjoy, and (b) pay tax based on the actual price of their fuel, rather than (as is true for airlines) on an "initially established price" of $1.148 per gallon (84-921 J.S. 29-34; 84-926 J.S. 5-6; 84-929 J.S. 18-22). And appellants contend that Florida's fuel tax regime places a heavier burden on airlines than on trucking companies, even though both pay sales tax at 5% of an "initially established price" of $1.148 per gallon without mileage proration, since the market price of jet fuel during the relevant period was lower than that of diesel fuel and gasoline (84-921 J.S. 32-33; 84-929 J.S. 7 & n.4, 17). In appellants' view, the Equal Protection Clause requires that all carriers be treated identically.

It was long ago established that "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification." *Madden* v. *Kentucky*, 309 U.S. 83, 88 (1940). "The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." An equal protection challenge can prevail "only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes." *Ibid.* Accord, *e.g.*, *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 359-365 (1973) (citing cases).

The courts below correctly concluded that appellants "failed to demonstrate that a hostile and oppressive discrimination has been made" (84-926 J.S. App. 5). Florida's fuel tax regime, as revised effective April 1, 1983, does appear to impose a heavier burden on airlines than on other carriers, although the differential burden depends in part on the relative market prices of

various fuels, whose fluctuations are of course beyond the Florida Legislature's control. Florida's overall tax system, however, treats airlines more favorably in other respects. See 84-921 J.S. App. 13a-14a; 84-929 J.S. App. 31a. The State, moreover, cannot be said to have lacked a rational basis for repealing the mileage proration formula in the case of interstate air carriers, since "proration of mileage for aircraft has proven difficult in the past because of flight patterns over the Gulf of Mexico and Atlantic Ocean to avoid accumulation of intrastate mileage" (84-929 J.S. App. 31a). Although state taxes are not altogether immune from equal protection scrutiny (see *Metropolitan Life Ins. Co.* v. *Ward,* No. 83-1274 (Mar. 26, 1985)), the tax regime challenged here, relieved of the income-tax-credit provision struck down by the Florida Supreme Court, neither discriminates against out-of-state competitors nor lacks a rational relationship to Florida's legitimate purpose of raising money for public transportation.

3. Appellant in No. 84-926 challenges the holding that it lacks standing to contest the constitutionality of provisions governing fuel tax refunds to certain fishermen and farmers (J.S. iv, 4-5). Appellant did not allege that it competed, directly or indirectly, with farmers or fishermen (84-926 J.S. App. 11), and the Florida Supreme Court accordingly denied it standing to raise this challenge, reasoning that "the constitutionality of * * * a statute cannot be tested by a party whose rights or duties are not affected by it" (*id.* at 11-12). In so ruling, the court relied exclusively on Florida law. See *id.* at 11-13. In any event, its ruling is fully consistent with this Court's decisions. See *Allen* v. *Wright,* No. 81-757 (July 3, 1984).

CONCLUSION

The appeals should be dismissed for want of a substantial federal question.

Respectfully submitted.

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